With this major recommended change, Union Electric turns to address the other issues raised in the NPRM.

A. Overlashing And Other Attachment Space Use

In paragraphs 13-15 of the NPRM, the Commission requests comments on a series of issues concerning overlashing and other uses of pole attachment space. Union Electric addresses these issues in turn below.

1. The Heritage Cablevision Holding Is Inapplicable Under The 1996 Act

The Commission seeks comment on whether its holding in Heritage Cablevision should be extended to other circumstances. NPRM ¶13. In that case -- prior to the enactment of the 1996 Telecommunications Act – the Commission held that a cable operator could not be charged different rates for pole attachments that were a part of its cable systems network used to provide data communication services.[20/]

Union Electric believes that the Heritage Cablevision holding will be inapplicable once separate rates for telecommunication services under Section 224(e) become effective. Under the 1996 Telecommunications Act, any attachment used by a cable operator to provide telecommunications services would be subject to rates under Section 224(e) upon their becoming effective. The first sentence of Section 224(d)(3) expressly provides in this regard that rates under Section 224(d) will only apply to "any pole attachment used by a cable television system solely to provide cable service."[21/]

[20/] See Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co., 6 FCC Rcd. 7099 (1991), recon. dismissed, 7 FCC Rcd. 4192, aff'd sub nom. Texas Utils. Elec. Co. v. FCC, 997 F.2d 925 (D.C. Cir. 1993).

[21/] 47 U.S.C. § 224(d)(3) (emphasis added).

The second sentence of Section 224(d)(3) reflects that pole attachments used by a cable system to provide telecommunications services will be subject to rates under Section 224(e) upon the effective date of that Section.

Further, the Act defines a telecommunication carrier as "any provider of telecommunication services."[22/] Therefore, a cable system operator providing telecommunication services is a "telecommunications carrier" under the Act and falls within the scope of Section 224(e). Section 224(e)(1) expressly provides that "pole attachments used by telecommunications carriers to provide telecommunications services" are subject to the rate provisions of Section 224(e). Accordingly, a cable system operator, such as Heritage Cablevision, would be subject to rates under Section 224(e) for those attachments used to provide telecommunication services.

Thus, Union Electric disagrees with the Commission's statement that "a utility may not charge different pole attachment rates depending on the type of service provided by [a] cable operator." Subsequent to February 8, 2001, the effective date for rates under Section 224(e), a utility may charge a cable operator rates under Section 224(e) for those pole attachment used by the cable operator to provide telecommunication services. The Commission has expressly recognized this construction of the 1996 Act in paragraph 1 of the current NPRM.[23/]

[22/] 47 U.S.C. § 153(44).

[23/] In paragraph 1 of the NPRM, the Commission states (footnotes omitted):

> The 1996 Act expanded the scope of Section 224 of the Communications Act of 1934 ("Communications Act") to telecommunications carriers and created a distinction between pole

Footnote continued on next page

Accordingly, cable operators who use their attachments to provide telecommunication services must negotiate separate rates under Section 224(e) for those attachments used to provide such services. The Commission should therefore require as part of this rulemaking that cable operators certify to electric utilities whether and to what extent they are using their pole attachments to provide telecommunication services. Such certification should be required at least six months prior to Section 224(e) becoming effective in order to allow sufficient time to negotiate rates, terms and conditions of telecommunication usage of a cable operator's pole attachments. Further, the Commission should adopt regulations which require cable operators to notify electric utilities immediately of any subsequent change in usage of their pole attachments for providing telecommunications services. If a cable operator falsely certifies its poles attachment usage for telecommunications service or fails to notify the electric utility of subsequent changes in such usage, the Commission should either (1) allow the electric utility to charge the higher telecommunications rate for the operator's entire cable system for the time in question, rather than just those poles used for providing telecommunications service, or (2) require the cable operator to pay for an audit to identify those poles used for providing telecommunications service over the time in question.

Footnote continued from previous page

> attachments used by cable systems solely to provide cable service and pole attachments used by cable systems or by telecommunications carriers to provide any telecommunications service. The 1996 Act prescribed a new methodology for determining pole attachment rates for the latter group.

In sum, the Commission's ruling in Heritage Cablevision should not be extended. The precise holding in that case is addressed and effectively overruled by the 1996 Telecommunications Act.

2. Overlashing Of Pole Attachments

The Commission requests comments on whether providers of telecommunications services should be allowed to overlash their existing lines with additional fiber cable, and if so, whether they should be allowed to permit third parties to use the overlashed facility. NPRM at ¶ 15. The Commission also seeks comment whether third parties should be permitted to overlash existing attachments of cable systems or telecommunications carriers and the contractual obligations that utilities should be permitted to require of attaching entities that allow overlashing. Id.

a. Safety And Reliability Considerations

Union Electric's paramount concern with the overlashing of pole attachments is the safety and reliability of its electric distribution system. The overlashing of an attachment will increase the loading on the pole, particularly under windy or icy conditions. The increased diameter of the overlashed attachment increases the surface area on which ice can accumulate and the resistance to wind. Also, crevices in the wrapping overlashing the attachment could retain water and snow. Thus, under the wintry, icy conditions that can be experienced in Union Electric's service area, overlashing can cause a significant increase in the loading on the pole. This increase in loading

could cause the pole to learn, lines to sag, or even worse, the pole to break or collapse.[24/]

Union Electric is particularly concerned about the impact that overlashed facilities may have on pole safety and reliability because of the potentially large increase in overlashing as more entities seek to provide various types of telecommunications services. Utilities do not have the personnel to monitor attachments to their thousands of poles, particularly as the market for electricity is deregulated and becomes more competitive. Thus, there is a grave potential for utilities to lose control over their own systems by parties overlashing their facilities, for their own use and for use by third parties, without proper notification and review by the electric utility of the safety and reliability implications of the overlashing.

Accordingly, the Commission should require as part of this rulemaking that any party seeking to overlash existing pole attachments must notify and obtain the prior approval of the utility before performing the overlashing. The party seeking to overlash should be required as part of this notification to provide the utility with complete engineering and design information concerning the pole attachment as overlashed. This information will allow utilities to evaluate the impact of the proposed overlashing on the safety and reliability of their distribution systems. A utility should be able to charge the party requesting to overlash reasonable make ready charges to cover the costs of performing this review. Such prior notification, review and

[24/] Typically, the increased loading will begin to cause the anchors holding the pole in place to fail which initially would cause the pole to lean and eventually could cause it to collapse. If an anchor begins to fail, allowing a pole to lean by as little as two inches, the height of pole attachments at the mid-span could be reduced by one or two feet depending on the distance between adjacent poles.

approval should be required regardless of how the Commission decides to treat the overlashed facility for rate purposes.

b. Rate And Contractual Considerations

Union Electric disagrees with the Commission's tentative conclusion in paragraph 15 of the NPRM that telecommunication carriers (or cable systems) should be able to overlash their existing lines with additional fiber without a separate pole attachment agreement or fee. An additional fee is appropriate because, as already discussed, the overlashing creates additional loading on the pole. Every pole, depending on its size, has a set limited loading capacity. Accordingly, the overlashing of an additional cable allocates part of this limited capacity to the overlashed facility analogous to the initial attachment. This in turn could require a subsequent attacher to pay make ready costs for the replacement of the pole even though adequate space existed on the pole for the subsequent attachment. Thus, overlashing is equivalent to a new, separate attachment and should be treated as such for rate purposes under both Sections 224(d) and 224(e).

Additional considerations mandate treating overlashed facilities as separate attachments where the attaching entity leases or permits third parties to use the overlashed facilities. The third parties should pay the utility the full attachment rate, or some significant portion of that rate, because they benefit from the pole in the same manner as any other attaching entity. Moreover, pole attachment rates under Section 224(d) and Section 224(e) (at least until such rates are fully phased in) are subsidized by the utilities and their ratepayers. Cable systems and telecommunications carriers should not be able to take advantage of their regulated, subsidized rates by marketing

overlashed facilities to third parties at unregulated prices. By allowing numerous overlashed facilities to their initial attachment, they could recoup many times over the regulated, subsidized rate paid to the utility while continually increasing the load on the pole. Such a result is not right or fair, and should not be countenanced by the Commission.

Therefore, where a third party uses an overlashed facility, it should be required to enter a separate pole attachment agreement with the utility which will provide for payment of the established rate. Moreover, the third party should be required to provide the same contractual assurances as that required by the Union Electric for entities making attachments to its electric poles, such as various indemnification provisions to protect the utility from potential liabilities arising from the installation, presence, operation and maintenance of the attachment.[25/]

3. The Leasing Of Dark Fiber

The Commission requests comments on whether providers of telecommunication services may allow a third party to use dark fiber in their original lines or within overlashed lines. NPRM ¶ 15. The Commission also seeks comment on what contractual obligations utilities should be permitted to require of attaching entities who lease excess dark fiber. Id.

[25/] Even if the Commission were for some reason to conclude that third parties using overlashed facilities should not pay a separate rate for the overlashed facility, Union Electric would still need to have a separate contract with the third party to provide for necessary contractual protections from the installation, presence, operation and maintenance of the overlashed facility on the utility's distribution system.

The leasing of dark fiber within an existing attachment would be difficult to monitor. Moreover, it does not increase the load on the pole or otherwise physically burden the pole. Accordingly, Union Electric does not believe that leasing dark fiber within an original existing attachment should be treated as a new, separate attachment under the Act. One exception, however, would be if an attachment that was previously used solely for providing cable services would, as a result of the leasing of dark fiber, also be used for providing telecommunications services. If that were the situation, the rate for the attachment would be determined under Section 224(e), upon the effective date of that provision, instead of Section 224(d).

Similarly, as long as an overlashed facility is treated as a separate attachment under the Act, Union Electric does not believe that the leasing of dark fibers within the overlashed facility would require a different rate treatment, with the caveat expressed above. If, however, the Commission were to treat overlashed facilities differently for rate purposes depending on whether they are used by the original attaching entity or a third party, then Union Electric believes that the leasing of dark fiber in either the original or the overlashed facility should be treated as separate attachments under the Act. This would be appropriate because an additional party is taking advantage of the additional pole capacity allocated to the overlashed facility.

B. Pole Height And Space Presumptions

The Commission requests comments on presumptions concerning pole height, usable and non-usable space, allocation of the 40-inch safety space required by National Electric Safety Code ("NESC"), and allocation of usable space. NPRM ¶¶ 16-20.

Union Electric responds below to the Commission's request for comments on these issues.

1. Presumptions On Pole Height And Usable Space

In the March 1997 Pole Attachment Notice, the Commission requested comments on whether it should modify its current presumptions of an average pole height of 37.5 feet with an average amount of usable space of 13.5 feet. The Commission requests further comment on this issue in the current notice as well. NPRM ¶ 17.

Union Electric commented on these issues in Section III.A of its comments dated June 26, 1997 filed in response to the March 1997 Pole Attachment Notice, which it incorporates by reference and relies upon here. Briefly summarized, Union Electric's position is that the presumption of usable space should be reduced to exclude the 40-inch safety space because it is not usable electric utility space as previously assumed by the Commission (discussed more fully below).

2. Allocation Of Safety Space

The Commission proposes that its approach under Section 224(d) to the safety space required by the NESC to be maintained between power lines and communication lines should also apply to telecommunications carriers under Section 224(e). NPRM ¶ 20. As in the March 1997 Pole Attachment Notice concerning rates under Section 224(d), the Commission tentatively concludes that the safety space emanates from a utility's requirement to comply with the NESC and therefore should be assigned to the utility as part of its usable space. Id.

Union Electric strongly disagrees with the Commission's tentative conclusion that the 40-inch safety space required by the NESC should be treated as electric utility usable space. Union Electric has set out at length in its comments filed with respect to the March 1997 Pole Attachment Notice, which it incorporates by reference, the reasons why the Commission's tentative conclusion is erroneous and why the 40-inch safety space should be treated as unusable pole space. Briefly summarized, these are as follows:

- First, the Commission's starting premise that the NESC places requirements solely on electric utilities and not communication companies is wrong. To the contrary, the provisions of the code (quoted in Union Electric's June 26, 1997 comments) make it abundantly clear that NESC applies equally to both electrical utilities and communication utilities with pole attachments. By its very terms, communication companies "performing design, construction, operation, or maintenance tasks for . . . communication lines or equipment covered by [the] code [are] responsible for meeting applicable requirements" set forth in the code.[26/]

- Second, the undisputed purpose of the 40-inch safety span -- as recognized by the Commission -- is to protect communication employees that are "working on cable television or telecommunications attachments" from possibly contacting "potentially lethal electric power lines." NPRM ¶ 20. Communication workers are not trained to work with potentially lethal electric power lines. Therefore, as expressly recognized by the NESC

[26/] NESC Code, Section 012 ("General Rules") (1997 Edition).

Handbook, the code requires the separation of electrical supply and communication lines "[f]or their safety" and protection.[27/]

- Third, the specific reasons given by the Commission in its initial 1978 rulemaking under Section 224(d) for assigning the 40-inch safety space to electric utilities either (1) are no longer applicable given the subsequent passage of the 1996 Telecommunications Act or (2) were based on a faulty understanding of the severely limited use made of the safety space by some electric utilities. Concerning the latter, the NESC prohibits a electric utility from locating within the 40-inch safety zone any current carrying supply conductors. Accordingly, this space cannot be treated as usable electric utility space.[28/]

Thus, the 40-inch safety space -- in which no current carrying supply conductors may be located -- emanates from the need to protect communications workers from electric lines. Absent communication company workers, this 40-inch safety space would not exist.

In sum, Union Electric believes that the Commission should treat the 40-inch safety space as unusable space created by virtue of the fact that multiple uses are being made of the electric pole. If, however, the Commission determines that the 40-inch

---

[27/] National Electrical Safety Code Handbook, Fourth Edition, Allen L. Clapp, Editor, at 308 (1997).

[28/] A utility may locate certain, ancillary equipment within the top 10-inches of the safety zone, but as explained in Union Electric's June 26, 1997 comments, this equipment is limited to non-current carrying equipment that it is effectively grounded consistently throughout a well-defined area.

safety space should be treated as usable space, it must be assigned to communication companies. The logic for doing so is even more compelling with respect to Section 224(e) than Section 224(d), discussed in Union Electric's June 26, 1997 comments. Under Section 224(e)(3), attaching entities are to be apportioned the cost of usable space on the pole "according to the percentage of usable space required for each entity." As discussed, the 40-inch safety space is required because of the presence of communication company attachments on the electric utility pole.

3. Allocation Of Usable Space

The Commission requests comments on the "amount of usable space occupied by telecommunication carriers" and on "whether the presumptive one foot used for cable is applicable to telecommunications carriers generally." NPRM ¶ 19.

As stated above, under Section 224(e)(3) the cost of usable space apportioned to each attaching entity is to be based on "the percentage of usable space required for each entity."[29/] Thus, the Commission is to look at how much space an entity requires for its attachments and not just merely the space that the attachment physically occupies. The space required by an attachment would include any required clearances as well as any NESC or other requirements that effectively require the allocation of usable space on the pole with respect to the attachment.

The usable space "required" by telecommunication carriers will vary depending on the nature of the attachment as well as the method of attachment. In Union Electric's service area, telecommunication carriers attaching fiber optics cables to Union

[29/] 47 U.S.C. § 224(e)(3) (emphasis added).

Electric's poles have generally pulled the cable tight, with little or no sag. In such circumstances, the tightly pulled fiber optics cable will be at the same height at the mid-span of the pole as a properly hung attachment above it with the required sag. Such juxtaposition of the two lines violates the NESC code which requires parallel attachments to be separated by appropriate distances between the spans of the poles as well as at the poles themselves. The running of tightly pulled fiber optics cable places Union Electric in a difficult position, for the tensioned fiber optics cable cannot be easily sagged except by cutting and rerunning of the cable.

Additionally, at the same time Union Electric has experienced problems where attachers, particularly cable TV operators, have allowed too much sag in their lines. Again, this can result in the mid-span juxtaposition of two lines contrary to the requirements of the NESC.

Accordingly, the Commission as part of this rulemaking should expressly recognize that the usable space required for attachments under Section 224(e)(3) will depend on how an attachment is made to the pole. The Commission should expressly allow utilities to charge for more than one foot of usable space where the method of attachment used by the attacher requires the allocation of more than one foot of usable space. In instances such as tightly pulled fiber optics cable, described above, an allocation of two feet of usable space would be appropriate.

C. Allocating The Cost Of Other Than Usable Space

The Commission proposes a formula for implementing Section 224(e)(2), which provides as follows:

> A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

The formula proposed by the Commission is as follows:

$$2/3 \times \frac{\text{Unusable Space}}{\text{Pole Height}} \times \frac{\text{Net Cost of a Bare Pole}}{\text{Number of Attachers}} \times \text{Carrying Charges}$$

The Commission requests comments on a series of issues concerning the implementation of this formula. NPRM ¶¶ 22-28.

At the outset, Union Electric believes, as discussed above, that (1) the "net cost of a bare pole" in the above formula should be replaced by current pole replacement costs and (2) the carrying charge for the formula should be levelized so as not to rely on net depreciated investment to determine the yearly rate. The remainder of Union Electric's comments with respect to this formula and the questions raised by the Commission are set forth below.

1. Attaching Entities For Purposes Of Allocating The Cost Of Unusable Space

The Commission has proposed that attaching entities for determining the "number of attachers" in the above formula should include any telecommunications carrier, cable operator, local exchange company ("LEC") or government agency with attachments on the pole. NPRM ¶¶ 22-24. The Commission also tentatively concludes that an electric utility which is providing telecommunication services should be counted as a separate attaching entity for the purpose of allocating the cost of unusable space under the above formula. NPRM ¶ 22. Finally, the Commission seeks comment on whether a telecommunications carrier should be counted as a separate attaching entity for each foot, or partial increment of a foot, that it occupies on the pole and on whether entities that use either overlashed facilities or dark fibers should be considered separate attaching entities. NPRM ¶¶ 23, 25.

Union Electric believes that only telecommunication entities should be counted as separate attaching entities for purposes of apportioning the cost of 2/3 of the common unusable pole space under Section 224(e)(2). By including other entities in this apportionment, the electric utility would in effect become responsible for the portion of these costs attributable to those entities in addition to the cost of 1/3 of the unusable pole space for which it is solely responsible under Section 224(e)(2). Such a result is contrary to both the structure and the intent of Section 224(e). In this regard, the Commission has correctly recognized that electric utilities are not to be counted as a separate attaching entity (at least to the extent they do not provide telecommunication services) for apportioning the cost of 2/3 of the common unusable space under Section 224(e)(2). Rather, insofar as their electric utility attachments are concerned,

electric utilities should be limited to bearing the cost of 1/3 of the unusable pole space as provided for by Section 224(e)(2). With this overview, Union Electric turns to address the specific questions raised by the Commission in the NPRM.

a. Telecommunication Carriers And Cable Operators

The Commission proposes that any telecommunications carrier or cable operator attaching to a pole should be counted as a separate entity for apportioning the cost of 2/3 of the common unusable pole space under Section 224(e)(2). NPRM ¶ 22. Union Electric agrees that telecommunication carriers should be counted as a separate attaching entity. Union Electric disagrees, however, that any cable operator should be so counted. Where the pole attachment of the cable operator is "used solely to provide cable service," the cable operator should not be included as an attaching entity under Section 224(e)(2) because the attachment is not subject to rates determined under Section 224(e). The rates determined under Section 224(e) are limited to telecommunication carriers providing telecommunication services, and therefore the rate methodology set forth in the Section 224(e) -- including those entities among whom 2/3 of the common usable costs are to be apportioned under Section 224(e)(2) -- should be presumed to be limited to telecommunication carriers.[30/]

Such an interpretation is confirmed by the fact that both Section 224(e)(2) and Section 224(e)(3) use the word "entities" and cable operators using their attachments solely to provide cable service clearly are not included in the term "entities" as used in Section 224(e)(3). Specifically, Section 224(e)(2) provides for apportioning the cost of

[30/] 47 U.S.C. § 224(e)(1). As discussed previously, telecommunication carriers subject to rates under Section 224(e) would include cable operators who use their attachments to provide telecommunication services.

2/3 of the unusable space "among entities" such that the cost would be allocated to such entity under an equal apportionment of such costs "among all attaching entities." Section 224(e)(3) provides for apportioning the cost of usable space "among all entities" according to the percentage of usable space required by each. Clearly, cable operators using their attachments solely to provide cable service are not included in the term "all entities" as used in Section 224(e)(3), which is broader then the term "all attaching entities" in Section 224(e)(2), because special rates are provided for them by Section 224(d)(3). Therefore, the only logical interpretation is to conclude that the entities referred to in both sections are the same and do not include cable operators using their attachments solely to provide cable service. The only other choice would be to conclude – unreasonably – that Congress intended to define the term "entities" differently for Section 224(e)(2) and Section 224(e)(3).

Moreover, to include cable operators as separate attaching entities under Section 224(e)(2) for their attachments used solely to provide cable service would result in the electric utility being responsible for the cable operators' share of the cost of 2/3 of the unusable pole space. Such a result is unreasonable because electric utilities are already solely responsible for the cost of 1/3 of the common unusable space under Section 224(e)(2).

Thus, cable operators should be included as separate attaching entities in apportioning the cost for unusable pole space under Section 224(e)(2) only for those pole attachments used by a cable operator to provide telecommunication services.

b. Local Exchange Companies

The Commission proposes to include LECs as attaching entities in apportioning costs for unusable pole space under Section 224(e)(2). NPRM ¶ 23. The Commission notes, however, that the definition of telecommunications carrier excludes incumbent LECs and that a pole attachment is defined as any attachment by a cable system or a provider of telecommunications service and seeks comments on how to proceed in light of these definitions. Id.

The statutory exclusion of incumbent LECs from the definition of telecommunication carriers subject to rates under Section 224(e) would appear to preclude their inclusion as an attaching entity for purposes of the apportionment under Section 224(2). Union Electric recognizes, however, that although incumbent LECs are not subject to rates determined in accordance with Section 224(e), they do have separate agreements with electric utilities under which they pay for their attachments. Accordingly, Union Electric believes that it would not be unreasonable for any individual utility to include them as a separate attaching entity in apportioning the cost of 2/3 of the common unusable pole space.

c. Electric Utilities Providing Telecommunication Services

As noted, the Commission has tentatively concluded that an electric utility providing telecommunication services should be counted as a separate attaching entity for allocating the cost of 2/3 of the common unusable space under Section 224(e)(2) with respect to those attachments used by the electric utility to provide telecommunications

services.[31] NPRM ¶ 22. Union Electric agrees that a electric utility, or most likely a subsidiary, providing telecommunication services would probably be considered a telecommunications carrier within Section 224 and a separate attaching entity for allocating the cost of 2/3 of the unusable space under Section 224(e)(2). If such services are being provided through a subsidiary, only the subsidiary and not the parent electric utility should be considered an attaching entity for purposes of allocating the cost of 2/3 of the unusable space among telecommunications entities.

d. Local Governmental Agencies

Union Electric believes that the Commission's proposal to include attachments of local government agencies, such as those for "traffic signals, festoon lighting or specific pedestrian lighting" (NPRM ¶ 24) is contrary to the Act. The term pole attachment is defined in Section 224(a)(4) to mean "any attachment by a cable television system or provider of telecommunications service . . . ." Attachments made by local governments for traffic signals or street lighting do not fall within this definition. Such attachments are for the common good and related to the public health and safety. They are not used to provide telecommunication services.

Therefore, local governments are not attaching entities for purposes of allocating non-usable space under Section 224(e)(2). To consider them as such would require electric utilities to absorb the portion of the cost for 2/3 of the unusable space attributable to such attachments. There is absolutely no reason why electric utilities should

[31] Attachments used by the electric utility to provide internal communications are not used to provide telecommunications services and therefore would not result in an electric utility being considered an attaching entity for allocating the cost of 2/3 of the common unusable pole space among telecommunication entities under Section 224(e)(2).

absorb these costs related to the common public good to the exclusion of other attaching entities making use of the pole (particularly given, as the Commission observes, that the governmental agencies often do not pay directly for these attachments). The utility is already absorbing its fair share of such costs by being solely responsible for the cost of 1/3 of the non-usable pole space.

e. Each Foot Of Usable Space Is Not A Separate Attachment

Union Electric believes that for purposes of apportioning common unusable space under Section 224(e)(2) an attachment should be counted as a single attachment regardless of how many feet of usable space it requires. Such an approach correctly recognizes that attaching entities benefit equally from the unusable common pole pace.

f. Overlashed Facilities And Leasing Of Dark Fibers

Entities that use overlashed facilities should be counted as separate attaching entities for purposes of apportioning the costs of unusable pole space under Section 224(e)(2). Such entities benefit from the common unusable pole space in the same manner and to the same extent as other attaching entities. Moreover, the overlashed facility directly impacts the pole, as discussed above, and accordingly such entities should pay their fair share of the costs of the common unusable space on the pole. Entities that lease dark fibers should be treated as a separate attaching entity for purposes of Section 224(e)(2) only to the extent they are recognized as separate attaching entities as discussed in Section III.A.3 above.

2. Determining The Number Of Attaching Entities

The Commission recognizes that "a pole-by-pole inventory" to determine the number of attaching entities under Section 224(e)(2) would be too costly to perform. It proposes instead that each utility develop, "through the information it possesses," a presumptive system average of the number of such attachers. NPRM ¶ 26. The Commission also seeks comment on whether different presumptive averages should be developed for areas that share similar characteristics and on whether the Commission itself should undertake a survey to gain the necessary data to develop a rebuttable assumption. NPRM ¶¶ 26-27.

Union Electric agrees with the Commission that a pole-by-pole inventory is overly burdensome and too costly to undertake. Currently, the only feasible method for Union Electric to determine the number of attaching entities for purposes of apportioning the cost for other than usable space under Section 224(e)(2) is to develop a presumptive system-wide average. Conceivably, as various databases are developed, Union Electric might be able to develop different presumptions for areas that share similar characteristics, such as urban, suburban or rural areas. However, it is not currently feasible for Union Electric to develop such presumptive averages.

Union Electric does not believe that a presumptive average number of attachments per pole should be determined by a Commission nation-wide survey. Such an approach could lead to a presumptive average that could differ significantly from the individual utility systems for which the rates are to be determined.

D. Allocating The Cost Of Usable Space Under Section 224(e)(3)

To calculate the rates for usable space under Section 224(e)(3), the Commission proposes to modify its current historical-cost methodology for determining maximum rates under Section 224(d) to reflect only the cost associated with usable pole space. Thus, the Commission proposes that the rates for usable space under Section 224(e)(3) would be determined by the following formula:

$$\frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \frac{\text{Usable Space}}{\text{Pole Height}} \times \text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate}$$

As in the March 1997 Pole Attachment Notice, the Commission seeks comment on the various aspects of this formula, including whether the costs of a bare pole should be determined using gross book costs instead of net book costs. NPRM ¶¶ 29-34. The Commission also seeks comment on the applicability of this formula when an entity either has overlashed to an existing attachment or is using dark fiber within the initial attachment of another entity. NPRM ¶ 35.

As discussed in Section II.B of these comments, Union Electric believes that the costs of a bare pole in the above formula should be determined using forward-looking pole replacement costs to accord with the Commission's recognition that a rate methodology "based on forward-looking economic costs best replicates . . . the conditions of a competitive market" and sends the "correct signals for entry, investment and innovation.[32/] If the Commission were to decide against the use of forward-looking replacement costs, gross costs instead of net costs should be used to determine the costs of a

[32/] Interconnection Order, ¶ 679; Universal Service Order, ¶ 224. As also discussed above, the carrying charge for the formula should be levelized so as not to rely on net depreciated investment to determine the yearly rate.

bare pole for the reasons set forth in Union Electric's comments dated June 26, 1997 filed in response to the Commission's March 1997 Pole Attachment Notice. Union Electric incorporates by reference and relies upon its June 26, 1997 comments with respect to this issue and other issues concerning the application of the above formula.

For the reasons discussed in Section III.A.2 of these comments, an entity that has overlashed to an existing attachment should be considered a separate attacher using the presumptive one foot of usable space for the attachment (or any other applicable space presumption). As previously discussed in Section III.A.3, entities that lease dark fibers should be treated as separate attachers if they lease dark fiber in an overlashed facility, or in an original attachment that has been overlashed with another facility, where the overlashed facility is not treated by the Commission as a separate attachment for rate purposes. In such circumstances, the original attacher could repeatedly overlash its facility leasing dark fibers in the original and the overlashed facilities to other entities with the original and overlashed facilities still being considered a single attachment for rate purposes even though the overlashed facilities place significant additional burdens on the pole. Considering an entity that leases dark fiber in such situations as a separate attacher would avoid such abuse.[33/]

IV. PROPOSED CONDUIT METHODOLOGY

The Commission proposes to follow the same historical-cost rate-making approach for electric conduit under Section 224(e) that it proposes for pole attachments. NPRM ¶¶ 36-41. The particular adaptation proposed by the Commission is the same

[33/] Union Electric believes, however, that a better solution would be to treat the overlashed facilities of the original attacher as separate attachments regardless of whether the original attacher leases dark fiber to a third party.

formulaic approach as that proposed for electric conduit in the March 1997 Pole Attachment Notice, which had been initially developed for telephone conduit. NPRM ¶¶ 38-40. As in the March 1997 Pole Attachment Notice, the Commission recognizes, however, that it has limited experience in resolving disputes relating to electric conduit and that there are "inherent differences in the safety aspects" of cable owned or used by cable operators and telecommunications carriers and conduit owned or used by electric utilities. NPRM ¶ 36. The Commission is also cognizant that its proposed rate formula "does not appear to take such differences into consideration," and it seeks comment on the "physical limitations" of electric conduit systems that would affect the rate for such facilities. Id.

The Commission is correct to recognize that the inherent characteristics of electric conduit may require the use of different rate setting principles. The characteristics of electric conduit differ from both telephone conduit and electric poles such that an entirely different rate setting methodology should be used for electric conduit. Even assuming that the Commission were to decide not to adopt a forward-looking rate methodology for poles, it should clearly do so for electric conduit. As explained in Union Electric's June 26, 1997 comments filed with respect to the March 1997 Pole Attachment Notice, electric conduit is an unique resource that cannot be readily duplicated. It is used by electric utilities mostly in urban areas where poles cannot be used or where cable cannot be buried directly in the ground.

Moreover, many existing electric conduit systems were constructed years ago and are mostly depreciated. Therefore, a huge disparity often exists between the book value of the conduit and its replacement value. In fact, the book value for some

conduit systems built decades ago is negative. For example, Union Electric is currently using conduit systems that were installed for or around the time of the 1904 World's Fair. Additionally, today's cost to construct even a modest conduit system in an urban area is a major undertaking and expense. As discussed in Union Electric's June 26, 1997 comments, the cost for Union Electric to construct new conduit systems today ranges from $125 to $250 per linear foot.

Therefore, a rate based on the historical cost of existing conduit systems would be confiscatory and could greatly disadvantage electric utility companies. A utility could be forced to provide access to its conduit at prices far below the replacements costs at which it may later be required to build new conduit necessary to perform its core business function of providing electrical service. Moreover, such a historical-cost based rate system would be counterproductive as discussed in Section II.B of these comments above. So long as the Commission requires Union Electric and similarly situated utilities to make conduit available to providers of telecommunication services at unrealistically low historical-cost levels, such providers will have no incentive to pursue other feasible alternatives even if those alternatives are less costly than the forward-looking replacement costs for conduits. By the same token, Union Electric and similarly situated utilities will have no incentive to add new conduit capacity to their systems, for they will simply lose more money based on the Commission's historical-cost rates.

Accordingly, the Commission must adopt a forward-looking rate methodology for electric conduit in order to avoid a misallocation of resources contrary to fundamental economic principles. As the Commission itself has recognized, a rate